IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

	*	_
MARTIN J. TANG,	*	
	*	3-97-CV-90232
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of	*	
Social Security,	*	
·	*	ORDER
Defendant.	*	
	*	

Plaintiff, Martin J. Tang, filed a Complaint in this Court on December 9, 1997, seeking review of the Commissioner's decision to deny his claim for Social Security benefits under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, 1381 *et seq.* This Court may review a final decision by the Commissioner. 42 U.S.C. § 405(g). For the reasons set out herein, the decision of the Commissioner is affirmed.

BACKGROUND

Plaintiff filed applications for benefits on January 11, 1995. Tr. at 96-99 & 100-102. After the applications were denied initially and upon reconsideration, Plaintiff requested a hear-ing before an Administrative Law Judge. A hearing was held before Administrative Law Judge Donald R. Holloway (ALJ) on November 11, 1995. Tr. at 35-73. The ALJ issued a Notice of Decision – Unfavorable on December 22, 1995. Tr. at 9-23. The ALJ's decision was affirmed by the Appeals Council of the Social Security Administration on October 30, 1997. Tr. At 4-5. Plaintiff filed his Complaint in this Court on December 9, 1997.

MEDICAL EVIDENCE

Plaintiff was injured in an automobile accident on September 24, 1994. The hospital emergency record states that a car ran a stop sign and pulled in front of Plaintiff. Plaintiff report-ed that his head had snapped forward and back. Plaintiff complained of neck stiffness and back pain. The diagnostic impression was diffuse muscle strain. Tr. At 131. An x-ray of Plaintiff's cervical spine showed no evidence of acute trauma, but very extensive degenerative changes and disc space narrowing at C5-6 and C6-7. Tr. At 134. A chest x-ray showed kyphosis of the lower thoracic spine with wedging deformities which Douglas Boatman, M.D. stated "probably repre-sents old Scheuermann's disease." Tr. at 135.

Plaintiff was seen by R. Tyson Garrett, M.D. on January 4, 1995. Tr. at 137-38. Dr. Garrett noted that Plaintiff had been taken off work for two months after his accident. During that time, Plaintiff had been treated with physical therapy¹, heat ultrasound, and ice after which "he markedly improved," and went back to work. Dr. Garrett noted that Plaintiff's work was that of a forklift driver, and that the work involved "a lot of neck turning left and right, rotation, hy-perextension." Plaintiff was unable to sleep at night because of the pain he had developed while working. Dr. Garrett wrote:

On examination, he is an alert, oriented, stocky gentleman with a short neck to begin with. Blood pressure 140/80 right arm. Neck supple without bruits, some stiffness, some cervical strap muscle tightness. Stocky guy, well built. Muscle exam, upper and lower extremities, 5/5. There seemed to be possible triceps weakness but he had secondary guarding because of pain down the arm. Cranial nerves II - XII were entirely normal. Lower extremities were normal. Reflexes were all symmetric at 1+. Triceps, however, were bilaterally absent. Biceps 1+, knee jerk, ankle jerk, 1+. Toes downgoing. Sensation normal.

^{1.} The records of Plaintiff's physical therapy treatment are in the transcript at pages 141-175.

Dr. Garrett's impression was that Plaintiff was suffering from a radiculopathy on the right side which had been exacerbated by the accident. Tr. at 137.

An MRI of Plaintiff's cervical spine, dated January 6, 1995, showed chronic changes of degenerative disc disease at the C5-6 level causing moderately severe right-sided neural foramin-al stenosis. "No high grade central stenosis or cord impingement was present." Tr. at 177. Plaintiff underwent an EMG on January 10, 1995, which showed evidence of acute and chronic denervation localized in the C5-6 nerve roots, and possibly at C6-7. It was noted that Plaintiff was again taken off work and that cervical traction was ordered. Tr. at 176.

On January 31, 1995, Ralph Knudson, M.D. wrote to Disability Determination Services. The Doctor explained that he had seen Plaintiff on nine occasions after the accident. Dr. Knud-son was also aware of Plaintiff's physical therapy treatment and of Dr. Garrett's treatment and diagnostic studies. Dr. Knudson wrote:

At my last visit with him on 11/22/94, he had been able to demonstrate lifting 40 pounds in physical therapy without pain. He was able to walk, sit, and stand without any difficulty as well as stoop, climb, kneel, and crawl. Hearing, seeing, speaking traveling were not affected. His work environment was not expected to be significantly adverse for him other than repeated significant rotational movements of the neck possibly exacerbating some of his pain.

Tr. at 179.

On February 20, 1995, Plaintiff underwent a cervical myelogram which showed cervical degenerative disc disease with multi level central spinal stenosis. Tr. at 184. A CT scan of Plaintiff's cervical spine revealed multi level cervical degenerative disc disease at the C3-4 through the C6-7

resulting in multi level central spinal stenosis which was moderate severe to se-vere. There was also neural foraminal stenosis at several levels. Tr. at 183.

Plaintiff was seen by Edward G. Law, M.D. on February 24, 1995. Tr. at 194-96. Plain-tiff complained of pain in both sides of his neck, worse on the right, in his shoulders and in the front of the deltoid muscle. Symptoms were aggravated by neck movement to either side, up or down, as well as by lifting or laying down, bending or driving a car. On physical examination, the "motor groups of the rotator cuff, deltoid, biceps, triceps, wrist flexors and extensors, grip and hand intrinsic strength shows no weakness on either side. Reflexes are 1+ and symmetric in the brachioradialis and triceps, and unelicitable in the biceps bilaterally." Tr. at 195. After a physical examination (Tr. at 195), Dr. Law's diagnosis was cervical spondylosis and multiple level cervical spinal canal stenosis. Tr. at 194. Dr. Law opined that Plaintiff has multiple level cervical spondyltic changes causing some secondary acquired canal stenosis but that Plaintiff had an intact neurological exam. The doctor stated that surgical treatment would not be indicated, although: "At some point in the future if he develops long track signs, the patient may require posterior decompression by a neurosurgeon." Tr. at 196.

Plaintiff underwent a cervical epidural steroid injection on March 1, 1995. The record of this injection states: "If he lifts over 20 lbs., he indicates that he has the sensation of pain radiat-ing up and down his spine. ... He had trouble at work, where his job requires repeated strenuous lifting and moving of heavy objects." Tr. at 197.

On March 22, 1995, Dr. Garrett wrote to Christopher Loftus, M.D., at the University of Iowa, to whom Plaintiff was being referred. Dr. Garrett wrote: "He has gone through full non-steroidal treatment, Elavil treatment, muscle relaxants, traction, physical therapy, even a cervical epidural. He

has had no improvement whatsoever. He is to the point where he is unable to work at his previous job but he surely is not disabled. He is unable to tolerate the pain any longer and would like some type of surgical opinion." Tr. at 203.

Plaintiff was seen at the University on April 19, 1995, by Winston Barcellos, M.D.. Tr. at 204-05. On physical examination:

[T]here was full range of motion of the neck although these motions are performed slowly. There is some aggravation of the right trapezius pain with rotation. Muscle is 5/5 throughout. He had full range of motion in his shoulder girdle and sensation was intact to sharp/dull and vibratory sense. There was a question of some diminished right hand to light touch discrimination. There is an area of tenderness along the right trapezius ridge and no specific trigger point is appreciated.

Plaintiff was given a TENS unit, and shown neck exercises by the physical therapy department. "There was a lengthy discussion with Mr. Tang regarding the fact that there may be a chronic nature to his problem and that there should be future improvement." Tr. at 205. When Plaintiff was seen on May 23, 1995, the neurologic exam was normal other than for some pain and limita-tion of motion. Plaintiff was told to continue using the TENS and doing his exercises, and to continue taking the prescribed medication. "We discussed with him the fact that we did not have much else to offer as there are no trigger points to be injected, and recovery of this musculoskel-etal pain will be a long process." Tr. at 206. When Plaintiff was seen at the University on June 24, 1995, the neurologic exam of the upper extremities was within normal limits. Tr. at 208.

On September 12, 1995, Dr. Loftus wrote a report, on behalf of Plaintiff addressed to the Office of Hearings and Appeals. Tr. at 210-11. The doctor wrote that Plaintiff's neurological examination was essentially normal except for subjective complaints of pain which were quite severe.

Tr. at 210. Dr. Loftus concluded his report: "Based on what I have told you, I would support the fact that he has a very real and difficult pain syndrome which appears to limit him rather remarkably in his ability to work as a fork-lift operator." Tr. at 211.

Rev. Dennis L. Hoffman wrote to Administrative Law Judge J. Michael Johnson on Oc-tober 3, 1995. Rev. Hoffman stated that he had counseled Plaintiff two times in the office and four times on the phone. "Marty told me that the reason he came to see me was that his family and attorney noticed a change in attitude on life – he was not himself. … Marty seems to be walking on a razors-edge. My observation is that his life-state is serious." Tr. at 215.

Plaintiff underwent a functional capacity evaluation on October 9, 1995, under the direction of Steve Sabo, O.T.R./L. Tr. at 217-24. It was determined that Plaintiff was limited to lift-ing no more than fifteen pounds, infrequently or occasionally, from floor to waist, waist to shoul-der, or during a short or long distance carry. He was not to lift more than five pounds infrequent-ly from his waist to overhead. Plaintiff was able to push twelve pounds infrequently and occa-sionally and pull eight pounds infrequently. Under the columns "frequent" and "constant", the word "Avoid" is written for all categories of lifting, pushing and pulling. Tr. at 222. The word "infrequent" was defined as 0 to 10%. "Occasional" was defined 10 to 33%. Tr. at 223.

Plaintiff saw Dr. Garrett September 27, 1995. Dr. Garrett noted: "Cranial nerves II-XII fine. Short neck. Limited motion. No atrophy. Reflexes, biceps, triceps look strong." Al-though Dr. Garrett stated that Plaintiff's mental status seemed fine, he also wrote: "[H]owever, he seems depressed to me." Dr. Garrett recommended continuation of the TENS unit, a function-al capacity evaluation, and "vocational rehab training because he is not going to be able to go back to being a

forklift driver." Tr. at 225.

From November 27, 1995 through January 17, 1996, Plaintiff underwent a vocational evaluation at Goodwill Industries. Tr. at 236-45. It was the evaluator's opinion that Plaintiff suffers from a major depression episode (Tr. at 244), the symptoms of which included sleep problems, increased irritability, weight change, problems with concentration, low energy, feel-ings of inadequacy, social withdrawal, loss of interest in pleasurable activities, tearfulness and crying, and recurrent thoughts of death and suicide. Tr. at 237. Terri Terrill, M.A., G.V.E., C.R.C., Vocational Evaluator, who wrote the report, stated: "In my opinion, Marty's signs and symptoms of depression are most likely directly connected to not having been able to return to full time, competitive employment." Tr. at 239. Ms. Terrill opined that Plaintiff demonstrated transferable skills during the evaluation period², however because of Plaintiff's pain, she opined that Plaintiff would only be able to work nine to ten hours per week. "There is a high probability that Marty will not be able to ever return to full time employment unless there is a significant change in his physical condition." Tr. at 244. Among Ms. Terrill's recommendations was that Plaintiff seek mental health services at the Johnson County Community Mental Health Center. She stated that services at the Mental Health Center are provided on a sliding scale. Tr. at 245.

ADMINISTRATIVE HEARING

^{2.} These "skills" consisted of: Detail oriented, ability to self check for accuracy; quality of work; ability to classify information; numerical and reasoning ability; ability to problem solve; academic skills; ability to generalize skills to new areas; interpersonal skills; quick learner; reliable, dependable; ability to work independently; willingness and cooperative; responsible; strong work ethic; motivation for employment. Nothing in this list, however, meets the definition of transferable skills within the context of Social Security law. The entire list consists of common attributes or basic work traits necessary to do most jobs. *See Podedworny v. Harris*, 745 F.2d 210, 220-21 (3d Cir. 1984). *See also, Fines v. Apfel*, 149 F.3d 893, 896 (8th Cir. 1998) in which Judge Heaney, in a dissenting opinion, discusses skills vs. aptitudes or abilities.

Plaintiff appeared and testified at a hearing on November 11, 1995. Tr. at 35-73. Plaintiff testified that he was "making reasonable attempts to find other work". Tr. at 40. Plain-tiff testified that the results of the functional capacities evaluation were an accurate reflection of his limitations. Tr. at 44. When he was asked to describe his limitations, Plaintiff testified:

Well, I have sharp pain in my neck, all the time. It's hard to look up or down or turn my head and when I lift objects that are very heavy, I get a sharp pain in my back and I, off and on, get sharp shooting pain in both my shoulders. That really limits me to what I can do.

Tr. at 44. Plaintiff told the ALJ that he would like to find work, that he was trying hard to find a job, but: "I just haven't had any luck and I'm hoping Vocational Rehab. can help get me in the right direction." Tr. at 45. Plaintiff said that he had been able to purchase a TENS unit. Tr. at 49. When asked about depression, Plaintiff said that he had talked to his priest "on three or four occasions, and also talked to Dr. Garrett about it." Tr. at 49.

Plaintiff told the ALJ that, because of the pain in his neck, he did not drive unless there was an emergency. Tr. at 53. Plaintiff said that his pain "feels like someone [is] driving a spike or a nail into my neck." He said the pain was with him all the time, and that there was nothing that makes the pain more severe. Tr. at 56. Plaintiff said that after being on his feet for two hours, he needs to sit down and relax. He said that he can sit for "an hour or so". Plaintiff said that the pain did not interfere with his ability to concentrate and remember. Tr. at 59. Plaintiff said that looking down, while sitting, hurts. He also said that, in order to look from side to side, he needs to turn his body from the waist. Tr. at 60.

After Plaintiff had testified, the ALJ called Carma Mitchell to testify as a vocational ex-pert. Tr.

at 62. The vocational expert agreed with the ALJ that the fact that Plaintiff was limited to light or sedentary work would, in itself, preclude the performance of Plaintiff's past relevant work. The ALJ pointed to "page six of [exhibit] 27 (Tr. at 222)" and added to it the need to alter-nate sitting and standing at two hours of sitting, or two hours of standing and one hour sitting. Tr. at 63. In response, the vocational expert testified that Plaintiff would be able to do all but ten percent of a full range of unskilled light and sedentary work. The ALJ then added that the hypo-thetical person would be unable to bend or turn his head and to see beyond his peripheral vision more than occasionally, and that the person must twist at the waist. The ALJ also told the voca-tional expert that the hypothetical person "cannot be constantly looking down at the tray of good-ies in front of him, but has to be free to stand up, stretch, but his head is fairly immobile." Tr. at 64. In response, the vocational expert testified that twenty five to thirty percent of the light and sedentary jobs would still be possible. Tr. at 65. The vocational expert pointed to jobs such as survey worker, surveillance monitor, information clerk and cashier positions as examples of the types of jobs that would remain. Tr. at 66-67. In response to questions from the ALJ, the voca-tional expert testified that if the hypothetical person needed to stop work several times a day be-cause of pain, there would be a significant impediment to competitive work. Tr. at 67-69. The vocational expert said that a slight weakness in grip would not significantly limit the jobs previ-ously identified. Tr. at 69. In response to a question from Plaintiff's counsel, the vocational ex-pert said that if the hypothetical person were distracted by pain two or three times an hour, the person would not be able to engage in competitive work. Tr. at 72.

ALJ'S DECISION

In a decision dated December 22, 1995, the ALJ found that Plaintiff was insured for dis-ability

benefits on the date that he claimed to have become disabled, and that he continued to be insured through the date of the decision. The ALJ found that Plaintiff had not engaged in sub-stantial gainful activity at any time since September 24, 1995, the alleged onset of disability date. The ALJ found that Plaintiff has severe impairments, namely chronic neck pain of probable muscloskeletal origin and degenerative disc disease at the C5-6 level. The ALJ found that Plain-tiff's impairments do not meet or equal one listed in Appendix 1, subpart P, Regulations No. 4 (the listings). The ALJ found that Plaintiff's testimony was essentially credible, but that "his contention that these restrictions preclude all work activity" was not accurate. The ALJ found that Plaintiff is unable to perform his past relevant work. The ALJ found that Plaintiff has a re-sidual functional capacity to work except for sitting more than one hour at a time, standing more than two hours at a time with the requirement that he be able to alternate between sitting and standing. In addition Plaintiff is restricted to only occasionally bending or turning his head and must bend at the waist to see beyond his peripheral vision, and cannot do a job requiring constant looking down, but is able to turn his head and look at a table. Tr. at 19. The ALJ found that Plaintiff was, at the time of the decision, 39 years old and that he has a highschool education. The ALJ found that Plaintiff is able to perform jobs such as those identified by the vocational expert, and that he is not disabled or entitled to the benefits for which he applied. Tr. at 20.

DISCUSSION

The scope of this Court's review is whether the decision of the Secretary in denying disability benefits is supported by substantial evidence on the record as a whole. 42 U.S.C. § 405(g). See Lorenzen v. Chater, 71 F.3d 316, 318 (8th Cir. 1995). Substantial evidence is less than a preponderance, but enough so that a reasonable mind might accept it as adequate to support the conclusion. *Pickney v. Chater*, 96 F.3d 294, 296 (8th Cir. 1996). We must consider both evidence that supports the

Secretary's decision and that which detracts from it, but the denial of benefits shall not be overturned merely because substantial evidence exists in the record to support a contrary decision. *Johnson v. Chater*, 87 F.3d 1015, 1017 (8th Cir. 1996)(citations omitted). When evaluating contradictory evidence, if two inconsistent positions are possible and one represents the Secretary's findings, this Court must affirm. *Orrick v. Sullivan*, 966 F.2d 368, 371 (8th Cir. 1992)(citation omitted).

Fenton v. Apfel, 149 F.3d 907, 910-11 (8th Cir. 1998).

In short, a reviewing court should neither consider a claim de novo, nor abdicate its function to carefully analyze the entire record. *Wilcutts v. Apfel*, 143 F.3d 1134, 136-37 (8th Cir. 1998) citing *Brinker v. Weinberger*, 522 F.2d 13, 16 (8th Cir. 1975).

LISTINGS OF IMPAIRMENTS

Plaintiff argues that he should have been found disabled on the basis of section 1.05C of the listings. This regulation, found at 20 C.F.R. Part 404, Subpart P, Appendix 1, requires med-ical evidence of vertebrogenic disorders such as spinal stenosis with: 1) Pain, muscle spasm, and significant limitation of motion in the spine; and 2) Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss. The Court agrees with Defendant that Plaintiff has not established an impairment which meets this definition. The medical evidence establishes that Plaintiff suffers from multi level cervical degenerative disc disease at the C3-4 through the C6-7 resulting in multi level central spinal stenosis. It is also undisputed that Plaintiff suffers from pain and that it is difficult for Plaintiff to turn his head from side to side and up and down. It is not clear, however, that Plaintiff's problems are caused by the stenosis in his cervical spine. For example, Dr. Barcellos' report of June 22, 1995 states that the MRI and myelogram, which he reviewed, "showed a general narrowing of the central canal, but do not seem to account for his symptoms." Tr.

at 208. The medical reports, discuss-ed in detail above, consistently describe Plaintiff's pain as being musculoskeletal in origin, rather than vertebrogenic. Furthermore, Plaintiff's neurologic examinations are consistently within normal limits which indicates that he has not demonstrated "appropriate radicular distri-bution of significant motor loss with muscle weakness and sensory and reflex loss."

There is some evidence which possibly detracts from the ALJ's finding that Plaintiff does not meet or equal a listed impairment. The EMG study of January 10, 1995, showed chronic denervation localized in the C5-6 nerve roots, and possibly at C6-7. In the opinion of the Court, this study is out weighed by absence of a diagnosis of radiculopathy from any of Plaintiff's physicians, other than the one time mention of radiculopathy by Dr. Garrett on March 22, 1995, and by the consistently normal neurological evaluations. In the opinion of the Court, the ALJ's finding that Plaintiff does not meet or equal a listed impairment is supported by sub-stantial evidence on the record as a whole.

DUTY TO DEVELOP THE RECORD MENTAL IMPAIRMENT

Next, Plaintiff argues that the ALJ failed to fully and fairly develop the record regarding a mental impairment, namely depression. The burden of establishing a severe impairment at step two of the sequential evaluation, lies with the claimant. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982)(en banc). There is very little, if any, medical evidence that Plain-tiff suffers from depression. On September 27, 1995, Dr. Garrett wrote that Plaintiff seemed de-pressed. Tr. at 225. He did not, however, diagnose depression. Nor did he refer Plaintiff for any mental health treatment. Plaintiff sought counseling from his priest. A priest, even one with some training in counseling, is not an acceptable source of medical opinion. 20 C.F.R. § 404.1513. Nor, did Rev. Hoffman offer a

diagnoses. He only stated that Plaintiff's life state was serious because of the accident, and because Plaintiff was financially strapped.

Depression was observed by Ms. Terrill during Plaintiff's evaluation at Goodwill Indus-tries.

This evaluation took place after the ALJ had made his decision, so he did not have access to it. Like Rev. Hoffman, Ms. Terrill is not an acceptable source of medical opinion. Although Ms. Terrill recommended that Plaintiff apply for mental health care at the Johnson County Community Mental Health Center, no records from that agency appear in the record of this case.

At no time did Plaintiff's counsel request that the ALJ order consultative examinations. Nor, did Plaintiff testify to any symptoms which would have caused the ALJ to order mental health examinations. Based on the evidence in the record, the Court does not believe the ALJ breached his duty to fully and fairly develop the record by not ordering consultative examinations. *Matthews v. Bowen*, 879 F.2d 422, 424 (8th Cir. 1989) (The regulations do not require the Commissioner to order a consultative evaluation of every alleged impairment.) In this case, the ALJ complied with the process as described in 20 C.F.R. § 404.1520a for the evaluation of a mental impairment. *See* Tr. at 21-23. In this record, there is no substantial evidence to detract from the finding that Plaintiff does not have a severe mental impairment.

GOODWILL VOCATIONAL EVALUATION

The Court finds no merit to Plaintiff's argument that the ALJ failed to develop the rec-ord because he did not wait for the report from the vocational rehabilitation agency. The hear-ing was held November 8, 1995. Plaintiff's evaluation at Goodwill Industries took place be-tween November 27, 1995 and January 17, 1996. The ALJ's decision is dated December 22, 1995. At the conclusion

of the hearing, the ALJ asked: Is there anything we're waiting for, for the record?" Plaintiff's counsel responded: "Not from me." Tr. at 73. There is no evidence in the record that counsel ever contacted the ALJ to inform him that the evaluation was taking place and to ask for time to submit a report. Although an ALJ has a duty to fully and fairly de-velop the record, even when a claimant is represented by counsel (*Warner v. Heckler*, 722 F.2d 428, 431 (8th Cir. 1983)), the ALJ cannot be expected to view the case through a crystal ball. If counsel felt that the report from vocational rehabilitation was likely to affect the outcome of the case, he should have informed the ALJ with a letter or even a phone call. Instead, the report was submitted to the Appeals Council.

When new evidence is submitted to the Appeals Council, the Court must speculate how the ALJ would have weighed it. *Flynn v. Chater*, 107 F.3d 617, 621-22 (8th Cir. 1997). In the opinion of the Court, the ALJ would have given the Goodwill report very little weight. The ul-timate conclusion of the report, that Plaintiff is only able to work nine to ten hours a week, is inconsistent with other evidence in the record, including the testimony of Plaintiff himself as well as the opinion of his physician that Plaintiff is not disabled. Plaintiff told the ALJ that he was trying hard to find work, but just hadn't had any luck finding a job. An inability to find work is not a basis upon which disability will be found. 20 C.F.R. § 404.1566(c).

The unpublished case cited by Plaintiff is distinguishable from the case at bar. In *McCallister* v. Chater, 1997 WL 1389464 (S.D. Iowa 1997), at *2 & 3, it is explained that after the administrative hearing, but before the ALJ made his decision, McCallister submitted a re-port from a psychiatrist. Based upon this report the ALJ completed a Psychiatric Review Tech-nique Form (PRTF). None of the limitations on the PRTF, however, had been included in the hypothetical

question to the vocational expert at the hearing. The Court held that the ALJ should have called a supplemental hearing to ask the vocational expert what effect the limitations, which the ALJ found to be credible, would have on McCallister's ability to work. In the case at bar, the ALJ was told by Plaintiff that there was no reason to hold the record open to receive additional evidence. Even when the evaluation commenced, the ALJ was not inform-ed that additional evidence, possibly favorable to Plaintiff, would be forthcoming. Furthermore, as stated above, it is the opinion of this Court that the ALJ would not have found the conclusion of the report to be credible in light of the other evidence in the record.

BURDEN OF PROOF

Next, Plaintiff argues that the ALJ did not properly shift the burden of proof. It is well settled law that having found Plaintiff incapable of his past work, the burden is on the Commis-sioner to come forward with medical evidence that Plaintiff has a residual functional capacity for other work, and that other work exists that Plaintiff can perform in his impaired condition. *McCoy v. Schweiker*, 683 F2d at 1146-47; *Talbott v. Bowen*, 821 F.2d 511, 514-15 (8th Cir. 1987). Plaintiff first argues that it was error for the ALJ to not include Plaintiff's mental im-pairment in the hypothetical question. The ALJ did not find that Plaintiff had a severe mental impairment. A hypothetical question is sufficient if it is based upon those impairments and limitations which are found to be credible. *Pertuis v. Apfel*, 152 F.3d 1006, 1007 (8th Cir. 1998); *Roberts v. Heckler*, 783 F.2d 110, 112 (8th Cir. 1985).

Plaintiff argues that the hypothetical was defective because it did not include the limitations noted during the functional capacity evaluation. A review of the hearing testimony, how-ever, belies this argument. The ALJ explicitly told the vocational expert to consider the lifting limitations from the

functional capacity evaluation. Tr. at 63. At no time, as Plaintiff argues, did the ALJ ask a hypothetical which asked the vocational expert to assume that Plaintiff could lift 40 pounds as suggested by Dr. Knudson. See Tr. at 63-69. In the decision, itself, the ALJ's actual residual functional capacity finding does not specify a lifting limitation. Tr. at 19. The ALJ, however, cited the jobs to which the vocational expert had testified Plaintiff would be able to perform given the lifting limitations in the functional capacity evaluation. Plaintiff points out that in the body of his decision, the ALJ wrote that the report of the occupational therapist who performed the functional capacity evaluation was not done by "medical professionals". While it is true that an occupational therapist would not be an acceptable source of medical opinion re-garding a diagnosis, it is the opinion of the Court that it should be viewed much like that of a chiropractor under 20 C.F.R. § 404.1513, i.e. to show how an impairment affects the claimant's ability to work. *Paterson v. Apfel*, 991 F.Supp. 1086, 1098 (S.D. Iowa 1998) (citing Cronkhite v. Sullivan, 935 F.2d 133, 134 (8th Cir. 1991)). This is exactly how the ALJ used the functional capacity evaluation. Therefore, the Commissioner satisfied his burden of coming forward with medical evidence to support the ALJ's finding that Plaintiff's has a residual functional capacity to engage in work activity.

The argument that the hypothetical was faulty because it did not take into account Plain-tiff's inability to attend to what he is doing, fails because the ALJ credited Plaintiff's direct tes-timony that his pain did not interfere with his ability to concentrate and remember. Tr. at 59. "It is perfectly appropriate for an ALJ to find a claimant's testimony to be credible, but disagree with the claimant's ultimate conclusion of disability." *Flynn v. Chater*, 107 F.3d 617, 621 (8th Cir. 1997). Again, the hypothetical is sufficient if it encompasses those limitations found credible by the ALJ.

Finally, Plaintiff takes issue with the testimony of the vocational expert because of Plaintiff's need to alternate between sitting and standing. In support of this argument, Plaintiff cites Social Security Rulings 83-12 and 83-10. These rulings, however, contemplate the need to alternate between sitting and standing *at will*. In this case, the ALJ relied on Plaintiff's testimo-ny that he is able to sit for an hour and stand for two hours at a time. The vocational expert testified that 25 to 30 percent of unskilled jobs are possible taking into account Plaintiff's ability to stand and sit, along with his other allegations of limitation which the ALJ found credible. Tr. at 65-66.

CONCLUSION

In the opinion of the Court, the Commissioner satisfied his burden of proving, with med-ical evidence, that Plaintiff has a residual functional capacity to work, and, with the testimony of the vocational expert, that jobs exist in significant numbers that Plaintiff can perform in his im-paired condition.

The final decision of the Commissioner is supported by substantial evidence on the rec-ord as a whole. The Court has reviewed the entire record in detail, considering the evidence which supports, as well as evidence which detracts from, the Commissioner's decision. The de-cision of the Commissioner is supported by substantial evidence on the record as a whole and is not affected by errors of law that require reversal or remand. Plaintiff's motion to reverse the Commissioner is denied. Defendant's motion to affirm the Commissioner's decision is granted.

IT IS SO ORDERED.		
Dated this	_ day of February, 1999.	
		ROBERT W. PRATT